

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

SENTENCING

October 30, 2019

John J. Moakley United States Courthouse
Courthouse Way
Boston, Massachusetts 02210

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1 question of Mr. Singer's -- Mr. Bizzack's, if I pronounce it
2 correctly, involvement in the conspiracy with Mr. Singer. Am I
3 correct? I mean, that's the core of what his involvement is,
4 right?

5 MS. KEARNEY: Yes, Your Honor.

6 THE COURT: All right. So now I want to get to this
7 question of, you know, what's the harm?

8 The government now has kind of settled, I guess --
9 maybe it's not fair to say "now." The government has this
10 theory that this is bribery, that is the proper way to
11 characterize what's going on. It's a mail fraud for bribery.
12 Now, I understand it's charged as a conspiracy, but the core
13 charging event is mail fraud.

14 MS. KEARNEY: Is honest services fraud, mail fraud.

15 THE COURT: Honest services, the statute is simply a
16 definitional statute. It's not the charging statute. You can
17 not charge it alone.

18 MS. KEARNEY: Correct.

19 THE COURT: Okay. So we're talking about mail fraud
20 as being the underlying crime, right?

21 MS. KEARNEY: Yes.

22 THE COURT: Okay. So this is supposed to be bribery.

23 MS. KEARNEY: Yes.

24 THE COURT: Who is being bribed?

25 MS. KEARNEY: Here it was Donna Heinel.

1 THE COURT: So how much did Ms. Heinel make from this
2 bribery? What was the bribe that was paid to her?

3 MS. KEARNEY: Personally she received approximately
4 \$160,000.

5 THE COURT: From this defendant in connection with
6 this matter?

7 MS. KEARNEY: A portion of that was in connection with
8 this defendant.

9 THE COURT: What portion?

10 MS. KEARNEY: That is not specified.

11 THE COURT: It certainly isn't. Now, what portion is
12 it? Does the government have a position on what portion it is?
13 Because I have to find what that is. You want to talk about it
14 as bribery, and I understand that. And that's a theory that is
15 at large I suppose in some fashion. But what is the bribe
16 amount?

17 MS. KEARNEY: Well, the bribe amount here was the
18 \$250,000.

19 THE COURT: No. What is the bribe amount with respect
20 to this defendant? It has to be reasonably foreseeable by this
21 defendant. So first we're going to talk about what the amount
22 is that Ms. Heinel -- do I pronounce that correctly -- Ms.
23 Heinel received for purposes of this transaction?

24 MS. KEARNEY: So the defendant, our understanding is
25 that he understood, and he's acknowledged this in his plea,

1 that the \$250,000 amount that he agreed with Singer was going
2 to be used to bribe officials at USC to get his son admitted.

3 THE COURT: So the amount is what he perceives would
4 be used even if it isn't used, even if that isn't the scheme
5 that Mr. Singer had?

6 MS. KEARNEY: The government acknowledges that there
7 is some disagreement among the case law about whether --

8 THE COURT: It's not just the case law. I'm just
9 talking about the facts now.

10 MS. KEARNEY: Yes, Your Honor.

11 THE COURT: If this were tried as a mail fraud bribery
12 case, okay, honest services as a commercial bribe. Put to one
13 side whether it fits easily into commercial bribery. But let's
14 just say it's a commercial bribery, and the government was
15 taking this to me for an evaluation on sentencing, what's the
16 dollar amount that we're talking about here?

17 MS. KEARNEY: So --

18 THE COURT: You said it was \$160,000, as I understand
19 it.

20 MS. KEARNEY: Personally. In addition there were
21 payments directly to USC but to accounts that she controlled
22 and benefited from.

23 THE COURT: That's not a bribe, is it? It's received
24 by USC. Then we've got a faithless employee. That's a
25 different issue from bribery, right?

1 MS. KEARNEY: No, Your Honor, because in light of
2 Skilling, there has to be a bribe or kickback.

3 THE COURT: Yes, there does, I agree. And this is a
4 case in search of a bribe or kickback, and now I'd like to find
5 it and find it with specificity because you've got to be able
6 -- if you want to make a request for an enhanced guideline
7 range, you've got to identify it.

8 So now we're back to this question of what was the
9 bribe that she received? Because it has to be to her, not some
10 account that she controlled, unless you say it was reasonably
11 foreseeable to him that she was going to toy with that account.

12 MS. KEARNEY: It was reasonably foreseeable to this
13 defendant because he sent a check directly to her --

14 THE COURT: To whom --

15 MS. KEARNEY: -- to be deposited into a USC account.

16 THE COURT: To whom was the check made out?

17 MS. KEARNEY: It was made out to the Galen Center.

18 THE COURT: Was it deposited to the Galen Center?

19 MS. KEARNEY: It was, and that's an account that Ms.
20 Heinel oversaw.

21 THE COURT: Right. And now, the Galen Center, was
22 that a 501(c)(3)?

23 MS. KEARNEY: This is a facility at USC.

24 THE COURT: Right. But would a payment to the Galen
25 Center, apart from machinations that she could undertake, would

1 that be a charitable contribution?

2 MS. KEARNEY: My understanding is yes.

3 THE COURT: Okay. So we've got \$50,000 going to the
4 Galen Center that I gather you say is, at least that's
5 identifiable bribery?

6 MS. KEARNEY: Yes, Your Honor.

7 THE COURT: Okay. Anything else?

8 MS. KEARNEY: There are also payments that Mr. Singer
9 made directly to Ms. Heinel beginning in the summer of 2018.
10 He agreed with her, given the number of students she was
11 helping him admit, including the defendant's son, to pay
12 \$20,000 a month. She would provide invoices to Mr. Singer.
13 One such invoice --

14 THE COURT: But how do we particularize that to
15 Mr. Singer?

16 MS. KEARNEY: To Mr. Bizzack.

17 THE COURT: I mean Mr. Bizzack, sorry.

18 MS. KEARNEY: She provided invoices to Mr. Singer.

19 THE COURT: Right, but how do we --

20 MS. KEARNEY: And one of those invoices identified the
21 defendant's son.

22 THE COURT: How much money?

23 MS. KEARNEY: That would have been a \$20,000 invoice.

24 THE COURT: Every time there's an invoice, it's
25 \$20,000?

1 MS. KEARNEY: Correct.

2 THE COURT: So now we're at 70, giving the government
3 the benefit of the doubt on this. Anything else?

4 MS. KEARNEY: No, Your Honor.

5 THE COURT: Okay. So we've got a \$70,000 bribe that
6 the government contends here. Not \$250,000. \$70,000. That's
7 reasonably foreseeable by anybody in this, unless you take the
8 position that some speculation on the part of Mr. Bizzack --
9 sorry if I keep using the wrong pronunciation -- Bizzack, is
10 that the proper --

11 THE DEFENDANT: Bizzack.

12 THE COURT: Bizzack. Okay. We've got \$70,000, right?

13 MS. KEARNEY: So there was \$70,000 actually received
14 by the bribe recipients.

15 THE COURT: But that was the whole scope, isn't it,
16 from Mr. Singer's point of view?

17 MS. KEARNEY: Well, the way Mr. Singer worked, the
18 scheme he never disclosed to parents that he was taking a --

19 THE COURT: He was the hub on this. And analyzing
20 this as a bribery scheme, it has to be whatever Mr. Singer was
21 prepared to pay to a faithless employee of USC.

22 MS. KEARNEY: Well, it also involves what the
23 defendant believed his bribe was going to.

24 THE COURT: So if the defendant believes that somebody
25 says I could get your child into USC for a million dollars,

1 doesn't tell him how; it doesn't tell him that it provides
2 Photoshop services, for example, it's a million-dollar bribe?

3 MS. KEARNEY: If the defendant then paid the
4 million-dollar bribe with the expectation --

5 THE COURT: Is there any case law that says something
6 like that?

7 MS. KEARNEY: I believe there is, Your Honor. I don't
8 have it at hand. I can submit something to the court.

9 THE COURT: That is reasonably foreseeable by the
10 defendant in a case like this?

11 MS. KEARNEY: Yes, Your Honor.

12 THE COURT: For purposes of sentencing, is that it?

13 MS. KEARNEY: I would --

14 THE COURT: You don't want to mix up a substantive
15 liability conspiracy with the liability that's identified for
16 purposes of the sentencing guidelines.

17 MS. KEARNEY: Your Honor, I would have to go back and
18 look at the cases to confirm.

19 THE COURT: So you're not familiar with any case law
20 that does it. Another way of saying it is you're not familiar
21 with the case law in this area; is that right?

22 MS. KEARNEY: Your Honor, I am aware that there are
23 cases. I have not looked at them recently. I apologize.

24 THE COURT: Did you think that that might be important
25 for purposes of sentencing? That is, the government bears the

1 burden of proving this, doesn't it?

2 MS. KEARNEY: Yes, Your Honor.

3 THE COURT: Okay. But you're not familiar with the
4 cases or at least you can't call them up right now?

5 MS. KEARNEY: Not off the top of my head, Your Honor.

6 THE COURT: So we have \$50,000 and \$70,000, and that's
7 reasonably foreseeable -- that certainly is reasonably
8 foreseeable from your point of view as to the defendant here?

9 MS. KEARNEY: Correct.

10 THE COURT: Okay. What's the basis for saying that
11 it's reasonably foreseeable that this defendant would have
12 known that that was the amount of money that would go to a
13 faithless employee?

14 MS. KEARNEY: Well, the government's position is that
15 it was reasonably foreseeable that \$250,000 would be going to
16 the faithless employee.

17 THE COURT: This is not meant to be exegesis by
18 assertion. Give me the evidence.

19 MS. KEARNEY: That the defendant understood that
20 \$70,000 was --

21 THE COURT: Yes, at least \$70,000 would go.

22 MS. KEARNEY: So again, Your Honor, our understanding
23 of the evidence is that the defendant believed \$250,000 --

24 THE COURT: What's the basis for believing that?

25 Mr. Singer apparently extracted from the defendant \$250,000.

1 Did he tell him all \$250,000 is going to go to Ms. Galen? Did
2 he tell him \$50,000 was going to Ms. Galen? Did he tell him
3 \$70,000 was going to Ms. Galen? What did he tell him that
4 would give him some reasonable foreseeability with respect to
5 this amount?

6 MS. KEARNEY: So what Mr. Singer told the defendant
7 and how it worked with the scheme at USC generally was that --

8 THE COURT: I want to know about this defendant. The
9 scheme generally is something to be taken up case by case and
10 has been taken up case by case. I want to understand it with
11 respect to this defendant.

12 MS. KEARNEY: So with respect to this defendant, this
13 defendant agreed that upon receipt of the conditional
14 acceptance to USC, he would send a \$50,000 check directly to an
15 account designated by Donna Heinel; and then upon receipt of
16 his son's formal acceptance to USC, he would have to make a
17 \$200,000 payment to Rick Singer's charity, the Key Worldwide
18 Foundation, and from that Mr. Singer would transmit the bribe
19 to USC or to the coaches that he was bribing at USC.
20 Mr. Singer did not share with the defendant that he was taking
21 a middleman fee.

22 THE COURT: That's not in the Presentence Report as
23 such, is it?

24 MS. KEARNEY: So in paragraph 33, it identifies that
25 the defendant participated in a scheme and conspired to pay

1 \$250,000.

2 THE COURT: Right. As I said, that's a kind of
3 summary of it. I want to get the specifics of the facts here.

4 MS. KEARNEY: So then -- sorry, Your Honor. In
5 paragraph 43 it indicates that the defendant at Mr. Singer's
6 direction issued a \$50,000 check to USC's Galen Center.

7 THE COURT: So the Galen Center, yeah. Does it say to
8 Ms. Heinel?

9 MS. KEARNEY: Yes, it does, because the voicemail that
10 the defendant left for Mr. Singer before sending the check
11 indicated, "Sending this check off to Donna, and I just put a
12 note in the letter just saying, you know, it's a donation."

13 THE COURT: So I'm supposed to draw from that that he
14 knew that this was going to Ms. Heinel for her own personal
15 use?

16 MS. KEARNEY: Yes, because he understood that Ms.
17 Heinel was the one directing him to send the money to this
18 particular account as opposed to USC's general fund or another
19 account within USC.

20 THE COURT: Okay. So let's go to the next part of it,
21 which is the \$20,000. Where do I see that?

22 MS. KEARNEY: Again, the \$20,000 is specified in
23 paragraphs 49 and 50.

24 THE COURT: No. That says that he's making the
25 payments to Heinel. The question is where do I see that

1 Mr. Bizzack was aware of that.

2 MS. KEARNEY: Well, Mr. Bizzack was aware, if we look
3 at paragraph 47 that and 48, that he was paying another
4 \$200,000 upon his son's formal acceptance.

5 THE COURT: Right, right. But where does it say that
6 it's to be used for a bribe?

7 MS. KEARNEY: Well, in paragraph 48, one of the
8 payments, the \$100,000 check that he sent, he included a note
9 tying the payment to his son's admission.

10 THE COURT: Right. But the question is payment as a
11 bribe to someone, and the someone being Ms. Heinel. So for
12 example, one of the problems, of course, is that people,
13 particularly people whose children are awaiting admission,
14 sometimes make large payments to institutions.

15 MS. KEARNEY: That's correct.

16 THE COURT: They're not bribes if they're not matters
17 of concealment, are they?

18 MS. KEARNEY: Correct, Your Honor.

19 THE COURT: As a matter of fact, you say that in the
20 previously sealed document that the deprivations here are
21 property in the form of admissions spots. That is, it's
22 property of USC that's been misappropriated in the form of
23 admissions spots. So if USC decides to take money, say
24 \$100,000 or \$200,000, and says, "By the way, we're going to let
25 this kid in," that's not any criminal violation; is that right?

1 MS. KEARNEY: It might be a violation of their
2 tax-exempt status. But no, I don't believe that to be a
3 criminal violation.

4 THE COURT: Okay. So we're drawing the line between
5 how USC, for whatever reason, decides to deploy its property in
6 the form of admissions spots, right?

7 MS. KEARNEY: Correct.

8 THE COURT: Okay. And so what do we know about Ms.
9 Heinel being the person who intercepts that ability in a way
10 that's knowledgeable to this defendant?

11 MS. KEARNEY: Well, Your Honor, the defendant
12 understood that his son was being admitted as a fake athlete
13 and that there had to be someone at USC, which he also knew was
14 Donna Heinel, who was arranging that in exchange for his
15 payment.

16 THE COURT: Well, we settled on Ms. Heinel for \$50,000
17 for present purposes. Now I'm talking about the other
18 \$200,000. Because you're wanting to use the guidelines to pile
19 on the amount of time that could be spent according to the
20 amount of money involved. So looking at \$200,000 more, where
21 do we have that he thought that this was or believed that this
22 was money going to Ms. Heinel as a faithless employee as
23 opposed to the institution itself or whatever it was that
24 Mr. Singer offered by way of services apart from facilitating
25 bribes?

1 MS. KEARNEY: So we have the defendant's agreement
2 with Mr. Singer that the defendant's son was being admitted as
3 a fake athlete and that the defendant understood that all
4 \$250,000 was going to be used as a bribe payment. He did not
5 understand that Mr. Singer was taking any kind of middleman
6 fee.

7 THE COURT: Okay. So Mr. Singer, as I understand it,
8 is cooperating; is that right?

9 MS. KEARNEY: That's correct.

10 THE COURT: What does Mr. Singer say?

11 MS. KEARNEY: Mr. Singer has told the government that
12 he did not disclose his middleman fee.

13 THE COURT: He did not disclose his middleman fee.
14 What did he disclose?

15 MS. KEARNEY: That --

16 THE COURT: Did he tell Mr. Bizzack that all \$200,000
17 was going to go to Ms. Heinel?

18 MS. KEARNEY: I'm not exactly sure, Your Honor. I
19 believe that he generally would tell parents to pay the bribe
20 amount, the full bribe amount and that it was --

21 THE COURT: Well, you've characterized a bribe amount.
22 That's petitio pincippi. We're begging the question by saying
23 it's the full bribe amount. I'm trying to figure out how it's
24 a bribe. So you say he told them to pay me \$200,000, and
25 that's a bribe. Did he tell him that's a bribe that's going to

1 go to Donna Heinel?

2 MS. KEARNEY: Mr. Singer was not as explicit, but it
3 was understood, given the fabrications to the student's
4 application such as --

5 THE COURT: Just assuming it was understood, which is
6 the passive voice way of expressing that there was nobody
7 saying anything, is there something that Mr. Singer said? For
8 instance, did he say, "I'm doing this for free for you. I'm
9 not taking a finder's fee out of this. I'm not taking any fee
10 for doing things like Photoshopping a kid"?

11 MS. KEARNEY: As Your Honor might be aware, with
12 criminal conspiracies like this, the co-conspirators --

13 THE COURT: I am aware --

14 MS. KEARNEY: -- don't generally lay out every single
15 detail.

16 THE COURT: Trust me, I am aware of that. Now, you
17 still have a responsibility of meeting your burden of proving
18 something like this, and I'm trying to understand what it is
19 that you're relying on for this theory.

20 MS. KEARNEY: So we're relying on the fact that the
21 defendant had an agreement with Mr. Singer to pay \$250,000 to
22 get his son admitted as a fake athlete; that the nature of the
23 payment connected to his son's admission as well as the fact
24 that his son had to be admitted as a fake athlete all in total
25 allowed the defendant to understand that the total amount was

1 being conveyed as a bribe payment.

2 THE COURT: Okay. So Ms. Corrigan, is it?

3 MS. CORRIGAN: Yes, Your Honor.

4 THE COURT: What's the defendant's position? I
5 understand you've stipulated to all of this, or you've
6 stipulated to an amount. Maybe the first question is why did
7 you do that?

8 MS. CORRIGAN: Well, Your Honor, as the court is
9 aware, Mr. Bizzack and counsel had conversations with the
10 government prior to entering into a plea agreement.

11 THE COURT: So it's an artifact of the plea agreement.

12 MS. CORRIGAN: I'm sorry?

13 THE COURT: It's an artifact of the plea agreement.

14 MS. CORRIGAN: Well, it essentially -- well, what I'd
15 like to say is that what we have here --

16 THE COURT: I tried to make clear to your sister, I'll
17 make clear to you, first answer the question I put to you. If
18 you've got something more that you want to say, of course I'll
19 listen to it. But it's a fairly simple question. Is it
20 because you wanted to facilitate a plea agreement?

21 MS. CORRIGAN: Yes.

22 THE COURT: Okay. What is the evidence as you
23 understand it that your client knew that \$250,000 was going to
24 be paid for a bribe?

25 MS. CORRIGAN: We don't have that information. And in

1 listening to the government today, we don't have the
2 information that I've heard about Mr. Singer. But what I will
3 tell the court is there's no question that \$250,000 was paid.
4 The evidence of the checks and the wiring from Eco-Pivot, one
5 of the companies, is --

6 THE COURT: But you see what I'm -- the parties can
7 agree to whatever they want. And the parties apparently have
8 -- not the parties, but the government in particular has been a
9 little upset that the Probation Office actually looked at this
10 carefully. As if this case begins and ends over the question
11 of what agreements was the government able to extract from
12 those who are vulnerable. But the court makes the decision
13 about sentencing --

14 MS. CORRIGAN: Understood.

15 THE COURT: -- issues, and this is something that I'd
16 like to get to the bottom of rather than just process through.
17 Did your client know that \$50,000 was going to be paid as a
18 bribe to Donna Heinel?

19 MS. CORRIGAN: No. He knew -- if I might, if we look
20 at the checks, the check was to the Galen Center, and he knew
21 that the check was going to -- that there was someone named
22 Donna that was associated with it. But beyond that, there was
23 no indication and no conversation that I'm aware of between
24 Mr. Singer and my client that indicates at any time that my
25 client knew that the \$50,000 or any amount was going to a

1 person named Donna, whether it's Donna Heinel or not, but let's
2 assume it is --

3 THE COURT: Why did your client pay \$50,000?

4 MS. CORRIGAN: Your Honor, this case is about getting
5 admission for his son to USC. There's no question about that.

6 THE COURT: Right. So there's an amount that's
7 figured out.

8 MS. CORRIGAN: Correct.

9 THE COURT: Is it simply, Mr. Singer says, "I can do
10 it through the side door, and it's, for you, \$250,000"? Is
11 that what it comes to?

12 MS. CORRIGAN: Yes, it's very simple. And if I might
13 just address -- I think the court -- I understand the court's
14 -- if I might move a little bit outside of the court's
15 question.

16 THE COURT: We'll see, we'll see.

17 MS. CORRIGAN: Okay. The court has, I understand the
18 tension between what's in the PSR and what's in the plea
19 agreement. And as the court has noted in our position, we're
20 in a little bit of a difficult position because I don't want to
21 put my client in a position of breach. However, what I would
22 note to the court is I've read through Judge Talwani's rulings.
23 I've seen what Judge Zobel has done. And I've read obviously
24 in very great detail what Ms. Victoria and her office has
25 produced in this case. I think it's very well thought out.

1 THE COURT: Wait. You are going beyond, because I do
2 want to move through this in an orderly fashion. It's not that
3 I'm not interested in all of that.

4 MS. CORRIGAN: Sure.

5 THE COURT: So what I'm faced with is the suggestion
6 that the defendant does not agree that he knew that there was
7 money to be paid to Ms. Heinel --

8 MS. CORRIGAN: He knew that --

9 THE COURT: -- as a bribe.

10 MS. CORRIGAN: Correct. The payments --

11 THE COURT: Go ahead. I'm sorry.

12 MS. CORRIGAN: Sorry. The payments --

13 THE COURT: I'm stretching. Not expressing nonverbal
14 communication about what I think.

15 MS. CORRIGAN: Thank you. The payments -- the bulk of
16 the payments go to the Key Foundation, KWF, which the court is
17 well aware of. And that's a foundation that Mr. Singer put out
18 there, and it's been described in various pleadings and in the
19 PSR as a sham charity. That's where the bulk of the money
20 went. There was no idea, no direction that I'm aware of by
21 Mr. Singer or any information given to anyone of where exactly
22 that money was going to go. He had some ideas about different
23 centers and that sort of thing, and that's all the information
24 that's before the court.

25 The \$50,000 check that goes to the Galen Center, I am

1 not aware of any communications or writings between Mr. Singer
2 and my client that indicate, Oh, this particular amount is
3 going to Donna Heinel, or this particular amount is going to
4 Ms. Janke or anybody else.

5 THE COURT: Well, Ms. Janke could not be a recipient
6 of a commercial bribe because she was not an employee. The
7 only person who could be the recipient of a commercial bribe
8 would be Ms. Heinel, unless the government disagrees with me
9 about that.

10 MS. KEARNEY: Right. No, Your Honor.

11 MS. CORRIGAN: And the only reason I bring that up is
12 because she is mentioned throughout the papers.

13 THE COURT: So let me just go back to this question.
14 What did he think when he wrote "Donation," question mark? Why
15 was it that, that he was concerned that his accountant would
16 get full information about the payments that he was making?

17 MS. CORRIGAN: No, Your Honor. In fact, he did not
18 submit this as some of the other parents did, he did not submit
19 this as a tax deduction.

20 THE COURT: Why did he say "Donation," question mark?

21 MS. CORRIGAN: I'm sorry?

22 THE COURT: Why did he say, "Donation" question mark?

23 MS. CORRIGAN: I believe that was directed by
24 Mr. Singer to write into the check.

25 THE COURT: Okay. So is that the state of the record,

1 that we have a dispute over whether or not there was a full
2 knowledge on the part of Mr. Bizzack?

3 MS. KEARNEY: Your Honor, I would just note back at
4 the change of plea hearing that the defendant did agree with
5 the government's representation that his participation in the
6 scheme, he agreed --

7 THE COURT: Could you tell me the page number.

8 MS. KEARNEY: At page 16, lines 5 through 12 of the
9 change of plea hearing indicate that he agreed and did pay a
10 total of \$250,000 to facilitate the admission of his son to USC
11 as a purported athletic recruit.

12 THE COURT: To use a scheme to use bribery and other
13 forms of fraud to facilitate it?

14 MS. KEARNEY: Correct.

15 THE COURT: But of course that's not really factual.
16 He agreed to plead to that, plead guilty to the information.
17 Now we're talking about facts. What are the underlying facts?

18 MS. KEARNEY: Right. And it goes on, Your Honor, on
19 that same page that he agreed to pay Singer an amount
20 ultimately totaling \$250,000 to facilitate the admission of his
21 son.

22 THE COURT: Where does it say "bribery to facilitate"?

23 MS. KEARNEY: I'm sorry?

24 THE COURT: Where does it say "bribery to facilitate"?

25 It's different from the language of the charge. This is the

1 specific language of facts that you have here, and it doesn't
2 seem to say bribery.

3 MS. KEARNEY: Well, Your Honor, while it doesn't say
4 the word "bribery," it does.

5 THE COURT: Well, words are important, you know.

6 MS. KEARNEY: It talks, though, about an exchange of
7 one thing for another, so it talks about that --

8 THE COURT: But this exchange could be with
9 Mr. Singer. If he did nothing but paid Mr. Singer \$250,000 and
10 there wasn't bribery involved, then we wouldn't have a bribery
11 guideline, right?

12 MS. KEARNEY: I'm sorry, Your Honor. Can you say that
13 again?

14 THE COURT: If he simply paid Mr. Singer to work his
15 magic and there was no evidence of bribery involved, then we
16 wouldn't be dealing with the bribery count, right?

17 MS. KEARNEY: If there's no evidence of bribery, then
18 we wouldn't be dealing with bribery.

19 THE COURT: Okay. So now I'm looking for the places
20 where there's evidence of bribery. You told me about the
21 clearing of the throat that the government did at the outset of
22 its recitation of the factual basis, simply to tell me first
23 what the charge was here. Then you said then the next thing
24 that they did is the defendant agreed to pay Singer, it
25 ultimately totaled \$250,000 to facilitate the admission of his

1 son.

2 MS. KEARNEY: Correct.

3 THE COURT: Doesn't say bribery.

4 MS. KEARNEY: It does not, but it goes on to talk
5 about payments to Donna Heinel from the Key Worldwide
6 Foundation in the amount of \$20,000 each month.

7 THE COURT: But where does it say that the defendant
8 is aware that \$20,000 each month is going to be paid to Donna
9 Heinel?

10 MS. KEARNEY: It does not say that explicitly.

11 THE COURT: Okay. And if I understand the
12 government's theory, whether conveyed to the defendant or not,
13 it is that there was an invoice each month for a different
14 person, a different student. Is this a kind of retention
15 agreement for Ms. Heinel?

16 MS. KEARNEY: She would send invoices indicating she
17 evaluated certain students and that the total amount of her
18 time for those invoices was \$20,000 a month.

19 THE COURT: So a month in which she evaluated five
20 people, she'd get \$20,000, and a month in which she evaluated
21 two, she would get \$20,000?

22 MS. KEARNEY: Correct.

23 THE COURT: So they were not allocated to the
24 students?

25 MS. KEARNEY: She did not divvy it up, no.

1 THE COURT: There's no evidence as to how it's to be
2 divvied up?

3 MS. KEARNEY: Correct.

4 THE COURT: Okay. So now we come back to the question
5 of whether you've got enough evidence here to show bribery by
6 this defendant. I understand the parties agreed to bribery and
7 appears to be an artifact of plea negotiations; who's got
8 power, who doesn't have power, and who can extract what by way
9 of agreements. But now I'm looking for the underlying
10 evidence. And this is it?

11 MS. KEARNEY: Well, Your Honor, the defendant did
12 plead guilty to conspiring to commit honest services mail
13 fraud, which requires bribery or kickbacks.

14 THE COURT: No, it doesn't.

15 MS. KEARNEY: Under Skilling it does.

16 THE COURT: That's a theory that you have. You can
17 also have a form of payment that's illegal. And no, just to
18 the contrary. A kind of cheating that's involved -- the
19 government doesn't like this because it doesn't run up the
20 sentencing guidelines, but you can have a kind of cheating
21 misrepresentation with respect to the foundation for which this
22 student is brought in. As a matter of fact, the government
23 takes that position, included it in its list of theories of
24 harm here.

25 MS. KEARNEY: But without the bribe payments, Your

1 Honor, it would not be honest services fraud.

2 THE COURT: I understand that. But to say that it's
3 honest services fraud is simply the government's theory of why
4 there's a violation of 1346.

5 MS. KEARNEY: Correct, but --

6 THE COURT: That's all -- I mean, you have a lesser
7 included offense of violation of mail fraud, don't you?

8 MS. KEARNEY: Yes, Your Honor, but the defendant pled
9 guilty to conspiracy to commit mail fraud and honest services
10 mail fraud.

11 THE COURT: Specifically stated, he pled guilty to a
12 violation of 1346.

13 MS. KEARNEY: I believe it's 1349, Your Honor.

14 THE COURT: 1349. Excuse me. Right?

15 MS. KEARNEY: Right, but it was --

16 THE COURT: Does that require bribery?

17 MS. KEARNEY: I'm sorry?

18 THE COURT: Does that require bribery?

19 MS. KEARNEY: Where he was charged as mail fraud and
20 honest services mail fraud, yes.

21 THE COURT: The government cannot prove it any other
22 way?

23 MS. KEARNEY: The government has -- the way it was
24 charged included the honest services mail fraud.

25 THE COURT: I understand. The government can't prove

1 it any other way? So that if there is not proof of bribery
2 here, then the defendant pled to a -- would have been pleading
3 to an offense that he didn't commit?

4 MS. KEARNEY: Well, Your Honor, I think the issue is
5 that he did plead to an offense he committed.

6 THE COURT: At some point you will answer my question,
7 I assume, but go ahead and answer the question that you'd like
8 to answer before you answer mine.

9 MS. KEARNEY: Well, Your Honor, I'll just go back to
10 the fact that there was an agreement here to pay \$250,000 to
11 get his son admitted. He understood that that money was
12 somehow being conveyed to USC. I acknowledge, Your Honor, we
13 don't have anything explicit saying how much of that amount was
14 going to USC. We know at least 50,000 he understood was going
15 to USC, or to an individual at USC, excuse me.

16 THE COURT: The individual at USC was to receive a
17 check for USC.

18 MS. KEARNEY: For an account that she controlled and
19 designated.

20 THE COURT: All right. But it's going to USC.

21 MS. KEARNEY: Yes, but they had to get the son in as a
22 fake athlete, so he understood that it was not a legitimate
23 donation, that it was tied to his son's acceptance and that
24 they had to hide his son's true nature, who, his son was not a
25 division level 1 volleyball player, was not being recruited by

1 USC to play volleyball, but they had to put him in that way in
2 order to get his admission.

3 THE COURT: Right. I understand the government's
4 theory. The question is the proof of the theory. So let's
5 perhaps back away from the bribery issue for a moment and
6 analyze the memorandum that you submitted for the methodology
7 of calculating gain and loss to Judge Talwani.

8 You identified three forms of pecuniary loss. One is
9 the value of the salaries the universities paid to the
10 employees the defendants and their co-conspirators conspired to
11 bribe. Is that the theory? In listening to you, you were
12 saying it was actually money paid to Donna Heinel. It's not to
13 be calculated in terms of some evaluation of what they were
14 being paid in a kind of payroll analysis.

15 MS. KEARNEY: So separate from the payments that Donna
16 Heinel received personally, in addition, USC was paying her for
17 her honest services.

18 THE COURT: See, in that memo to Judge Talwani, you
19 identified three separate forms of harm, right?

20 MS. KEARNEY: Correct.

21 THE COURT: Those are the ones, at least as of
22 September 5, the government was offering as their theories.

23 MS. KEARNEY: Yes.

24 THE COURT: The first one is that the government --
25 that the universities, including USC, lost the value of their

1 corrupt employees' honest services, right?

2 MS. KEARNEY: Correct.

3 THE COURT: That's in theory the bribery, but it's
4 particularized. It's said that the way you calculate this is
5 by looking to the salaries the universities paid to the
6 employees, monies the universities would not have paid had they
7 known their employees were corrupt.

8 MS. KEARNEY: Correct.

9 THE COURT: What you just told me was it depends upon
10 the amount of money that Mr. Bizzack knew, not the amount that
11 the universities knew.

12 MS. KEARNEY: No, Your Honor.

13 THE COURT: That's what it says here. Now, maybe
14 you're reformulating it, and certainly you're entitled to do
15 whatever you want to refine and reframe the question, although
16 I will be asking some questions about the evolving explanation
17 of why it was that bribery is being charged in this case and
18 then charged much more explicitly in a statute that provides
19 specifically for bribery in the context of government
20 contracts. But I want to take this snapshot at September 5,
21 and at September 5 you weren't arguing it this way, the way you
22 have today, right?

23 MS. KEARNEY: I apologize, Your Honor. I'm not sure
24 how you've interpreted the way I'm arguing it today.

25 THE COURT: So let me give a dramatic reading and you

1 can tell me how I've misinterpreted it. "While it is difficult
2 to calculate the value precisely, the loss can be approximated
3 by looking to the salaries the universities paid to the
4 employees the defendants and their co-conspirators conspired to
5 bribe - monies the university would not have paid had they
6 known their employees were corrupt and that they stopped paying
7 as soon as they found out."

8 MS. KEARNEY: That's correct, Your Honor.

9 THE COURT: So it's the salaries that they received,
10 not the amount of money that the defendant anticipated. Is
11 that it?

12 MS. KEARNEY: Your Honor, I think that there's two
13 separate issues here. The first is that under the parties'
14 stipulation as well as the government's --

15 THE COURT: You keep relying -- I can't be clearer
16 about this. There is throughout the government's filings this
17 idea that because you can extract an agreement from a defendant
18 that I'm bound by it. This is not a C plea. And even in a C
19 plea, I can reject it.

20 One of the insidious aspects of all of this is the
21 suggestion that suffuses this set of discussions that the
22 government decides what the sentence is going to be. That's
23 not the case. It certainly wasn't the case before Judge
24 Talwani, and I assure you it's not the case before me. So the
25 fact of an agreement is, as I've indicated before, an artifact

1 of plea negotiations, the kind of sausage-making that goes on
2 in the criminal justice system, but it does not determine this
3 matter.

4 And so now I'm asking you to justify the positions
5 that you've taken, without respect to there's an agreement.
6 And furthermore, without -- well, you can talk about it if you
7 want, if you think that the guidelines bind me in some fashion
8 on this. I don't think you'll take that position. But I need
9 to have evidence of this. I'm trying to find out the evidence.
10 What I'm hearing is something that is approximated at best, and
11 the approximation that you were talking about was not the
12 approximation that you made here.

13 MS. KEARNEY: So here, the government looked at 2B4.1,
14 which, the base offense level is 8, and then it can be enhanced
15 based on the bribe amount.

16 THE COURT: Right.

17 MS. KEARNEY: Before Judge Talwani, the government was
18 looking at 2B1.1, which, the base offense level is 7 and can be
19 enhanced based on --

20 THE COURT: But didn't you have a plea agreement at
21 that time with respect to 2B1 -- the bribery one? Didn't you
22 have a plea agreement that extended to that before Judge
23 Talwani? Weren't those plea agreements? So they didn't
24 include this particular plea agreement?

25 MS. KEARNEY: That's correct, Your Honor.

1 THE COURT: Okay. I'm sorry. That helps me
2 understand this a little bit better.

3 Okay. So maybe we do go into the history of this,
4 which is, how is it that the government was taking the position
5 with respect to essentially the same case different guidelines
6 at different times were applicable. As I understand it, let's
7 take the Abbott case, the government did not take the position
8 that there was an agreement in the Abbott case. It didn't make
9 an argument with respect to bribery, but the bribery argument
10 was not the same as it was here.

11 Then here, I'll just use this as another point in the
12 case, here, the government took the position in the plea
13 agreement which was, whenever it was -- June was it -- I can't
14 remember when the plea agreement was. I'll pull it out -- took
15 the position in the plea agreement and the defendant agreed to
16 it that the bribery guideline would be the proper guideline to
17 apply, right?

18 MS. KEARNEY: Correct, Your Honor.

19 THE COURT: Okay. So that's that position. I
20 understand it. And then at some point, I see it in another
21 case I have, Sui, the government supersedes and says, by the
22 way, it's government fraud, 666 violation, bribery. Okay. How
23 did that evolving understanding take place? What led to that?
24 You know, it just doesn't get pulled out of the air. It's
25 something that the government chooses to do in its charging

1 decisions.

2 MS. KEARNEY: Your Honor, with respect to the Abbott
3 case and the plea agreements there, the government made the
4 same mistake that you see in the PSR here that this was not a
5 bribery case and that 2B1.1 applies.

6 THE COURT: This is not holding you to some admission
7 or something, but it was a mistake or misunderstanding and not
8 completely developed. Do I fairly say it?

9 MS. KEARNEY: Correct.

10 THE COURT: So then the mistake is clarified in this
11 case or in cases like this where you start to cite to the
12 bribery violation?

13 MS. KEARNEY: That's correct.

14 THE COURT: Okay. And then when you charge 666, what
15 was the new understanding there?

16 MS. KEARNEY: I wouldn't say it's a new understanding.
17 It's just that the charges we believed and the grand jury
18 believed were appropriate.

19 THE COURT: But why didn't you believe it before? I
20 mean, you know, 666 is not a new statute.

21 MS. KEARNEY: It is not, Your Honor, but this, even
22 after it was initially charged in March, was an ongoing
23 investigation.

24 THE COURT: Right. But was there some new information
25 that said, by the way, we didn't know it before but USC

1 contracts with the government in a way that makes a case like
2 this eligible to be charged explicitly as bribery?

3 MS. KEARNEY: Your Honor, the U.S. Attorney has
4 prosecutorial discretion to decide on charging decisions.

5 THE COURT: That's right. Absolutely. I'm asking why
6 it was exercised, and maybe you just say, "None of your
7 business, Your Honor. It's not before you." But I don't know.
8 Is that your position?

9 MS. KEARNEY: I would defer to the prosecutorial
10 discretion of the U.S. Attorney.

11 THE COURT: Pardon me?

12 MS. KEARNEY: I would defer to the prosecutorial
13 discretion of the U.S. Attorney.

14 THE COURT: You are the U.S. Attorney here in court.

15 MS. KEARNEY: Yes, Your Honor.

16 THE COURT: So on behalf of the U.S. Attorney, you
17 decline to answer the question?

18 MS. KEARNEY: Your Honor, as I mentioned, this was an
19 evolving investigation. Decisions were made not to charge 666
20 initially. Perhaps we didn't have all the information we
21 needed. It has been charged against some of the defendants
22 now, not this defendant.

23 THE COURT: What information did you not have that
24 made you make the change?

25 MS. KEARNEY: I don't believe I can disclose --

1 THE COURT: What do you mean you can't disclose it?

2 MS. KEARNEY: Under grand jury secrecy rules.

3 THE COURT: You changed the charge. You have made
4 charges of other people on the basis of 666, and that's public
5 of course.

6 MS. KEARNEY: Yes, Your Honor, the charges are public.

7 THE COURT: Right. And the disclosure will have to
8 be, right? Won't there be discovery disclosure?

9 MS. KEARNEY: Yes, Your Honor.

10 THE COURT: So I understand your position is you don't
11 have to answer these questions any further. Maybe you won't
12 answer this question either. But perhaps you're familiar with
13 Rule 83.3.1. It's our rule with respect to release of
14 information by attorneys.

15 MS. KEARNEY: Yes, Your Honor.

16 THE COURT: In it, it explicitly says that those
17 persons associated with the prosecution in this case shall not
18 release any information by extrajudicial statement which a
19 reasonable person would expect to be disseminated by means of
20 public communication relating to, and it lists a series of
21 things, but number 5 is the possibility of a plea of guilty to
22 the offense charged.

23 MS. KEARNEY: I am aware of that rule, Your Honor.

24 THE COURT: Right. Now, if someone associated with
25 the prosecution engaged in that public dissemination, that is,

1 a discussion of the possibilities of pleas of guilty to the
2 offense charged or the possibility, for example, of enhanced
3 sentences or enhanced charges, would that be a violation of
4 Rule 83.21?

5 MS. KEARNEY: Your Honor, I don't believe I can answer
6 that question. I do know in the statements with respect to
7 Mr. Bizzack that have been released by our office, I believe
8 those are in compliance with the rule.

9 THE COURT: We're talking about the evolving
10 understanding of the United States Attorney's Office, including
11 those kinds of charges that have been subsequently made of
12 other individuals here. And perhaps you don't want to respond
13 to that.

14 MS. KEARNEY: Your Honor, I'm happy to convey the
15 message to the office, but as you might imagine --

16 THE COURT: Then let's go back. What we have is the
17 government has this evolving understanding of what can be
18 charged and what will be charged, how it will be charged and
19 how this question will be teed up. In the Abbott case the
20 government made a mistake. It didn't want to make the mistake
21 again. It made it explicit and got the defendant to agree to
22 bribery here.

23 MS. KEARNEY: Correct.

24 THE COURT: That's where we are. And the bribery, as
25 I understand it, is variously expressed, including the way you

1 expressed it here today, and I'm asked to draw some conclusions
2 of inferences about what the defendant knew about who was going
3 to be paid because he certainly had to know that someone who
4 was a faithless employee was going to be paid a bribe, right?

5 MS. KEARNEY: Yes, Your Honor.

6 THE COURT: And so the inference I'm supposed to draw
7 from the direction of a check made payable to someone, to an
8 entity that could not be bribed, it was the entity that would
9 have been the victim of the bribe or the government contends
10 it's a victim of a bribe. Although that statement, by the way,
11 of USC doesn't say "Bribery," does it?

12 MS. KEARNEY: Your Honor, I don't believe the letter
13 addresses that question.

14 THE COURT: But the letter addresses how it was
15 harmed, right?

16 MS. KEARNEY: It discusses how it was harmed, yes.

17 THE COURT: Right. And it doesn't say it was harmed
18 by bribery, right?

19 MS. KEARNEY: It doesn't say how it was harmed. It
20 identifies the harms.

21 THE COURT: To the contrary. It says two ways. One
22 way is that it affected its reputational interest, and the
23 other way is they had to spend money in investigation. Doesn't
24 say anything else, does it?

25 MS. KEARNEY: Well, it says that the harm was by the

1 conduct alleged by the government.

2 THE COURT: But they're talking about -- you know, a
3 victim witness statement generally, particularly by a
4 sophisticated institution, tells us what the loss is that
5 they're claiming or identifies what the harm is. They don't
6 identify bribery as a harm, do they?

7 MS. KEARNEY: They identify the conduct alleged by the
8 government.

9 THE COURT: Right, again, this kind of general charge,
10 right? Are they asking for restitution?

11 MS. KEARNEY: No, Your Honor.

12 THE COURT: Restitution is payment for the harm,
13 right? Reimbursement for the harm, right?

14 MS. KEARNEY: Yes, but it's within their discretion
15 whether they want to request it.

16 THE COURT: No doubt it is, but it doesn't appear that
17 they view this or at least they're not asserting it, I should
18 say, as a bribery case, right?

19 MS. KEARNEY: They have asserted this based on the
20 conduct alleged by the government. They are not seeking
21 restitution. There are many reasons why they might not be
22 seeking restitution, including their potential publicity around
23 it, and so I don't think that we can read anything into that.

24 THE COURT: So we just have to deal with their actual
25 language, right?

1 MS. KEARNEY: Yes.

2 THE COURT: Okay. So let's read their actual
3 language, since it's now public. And I've found them -- I'm
4 not even sure they're victims, frankly, but that's a different
5 issue. I'll assume they're victims. I'm going hear from them.
6 They submitted it presumably for purposes of influencing me.
7 And, you know, I look at the information, and they say,
8 "Applications containing false information that misrepresent
9 the applicant undermine public confidence in the college
10 admission process," which USC relies upon, and they hired
11 outside counsel. Those are the harms that they refer to. They
12 don't refer to anything else, right?

13 MS. KEARNEY: There's a general statement, Your Honor,
14 about other resources. But yes, that's right.

15 THE COURT: Well, those other resources are basically
16 having to spend money in connection with cooperation with the
17 government's investigation.

18 MS. KEARNEY: Well, it doesn't indicate that's in
19 cooperation with the government's investigation. They say,
20 "USC has also dedicated valuable employee time and other
21 resources to this matter."

22 THE COURT: Right. But where does it say "bribery"?

23 MS. KEARNEY: Again, Your Honor, it does not say
24 bribery, but it does indicate that the harm was caused by the
25 conduct alleged by the government.

1 THE COURT: Okay. It says or indicates. Now, let's
2 look at that language. Where does it say that, that we could
3 say that they are incorporating by reference whatever the
4 government ultimately ends up alleging? Where does it say
5 that?

6 MS. KEARNEY: In the first sentence of the last
7 paragraph on the first page, it references the conduct alleged
8 by the government, and I'll note at the time of this letter in
9 August that was after the information here was filed.

10 THE COURT: But let me just see precisely the letter,
11 the language that you're alleging they've incorporated by
12 reference what the government said.

13 MS. KEARNEY: In that first sentence of the last
14 paragraph on the first page of their letter.

15 THE COURT: The government -- "USC's reputation has
16 been harmed by the conduct alleged."

17 MS. KEARNEY: Correct.

18 THE COURT: Not, "We've suffered commercial bribery,"
19 right?

20 MS. KEARNEY: No, they don't say that.

21 THE COURT: Okay. So what they've said is that it
22 undermined the integrity of their process, the selection
23 process. What you characterize as their property right in
24 admission slots. And they've suffered some harm to their
25 reputation. That's reputation, I suppose. And then they hired

1 outside people, and hiring outside people in connection with
2 the investigation is not recoverable, is it?

3 MS. KEARNEY: Not as loss, Your Honor.

4 THE COURT: Right. Well, that's what we're ultimately
5 talking about here. So now we're back to what do I make of the
6 bribery here, other than its factual support is somewhat thin
7 and attributing it to the defendant is somewhat difficult under
8 these circumstances. The short of it being I wonder how
9 reliable that is for purposes of establishing a guideline, even
10 under an evolving theory of what the case is in this case.

11 But let me be sure that I haven't missed something
12 that you've alleged here. So apart from -- I'm going to
13 Abbott, the submission to Judge Talwani in Abbott. The second
14 grounds is that they undertook costly internal investigations
15 separate and apart from the government's investigation, and
16 those costs were direct and foreseeable consequences of the
17 defendants. I think we're agreed that's not a loss.

18 MS. KEARNEY: Your Honor, I before was speaking to
19 their -- in any investigation related to helping the government
20 with its investigation. But we would argue that these losses
21 are in fact losses.

22 THE COURT: Is there case law that says that
23 investigations that are conducted by someone into this sort of
24 thing is a compensable loss that's taken into consideration for
25 purposes of the sentencing guidelines?

1 MS. KEARNEY: Yes, Your Honor. There is the Piggie
2 case, where the investigative costs into the coach's scheme to
3 deprive the university of its honest services was properly
4 included in calculating loss.

5 THE COURT: And?

6 MS. KEARNEY: Then the DeRosier case, where, if the
7 investigation was prompted there, it was a bank, but for the
8 university's own benefit.

9 THE COURT: Bank investigation here. And again, no
10 dollar figure provided by the university here?

11 MS. KEARNEY: No, we have not received that yet.

12 THE COURT: So here is the thrust of it, I guess, and
13 that is the guidelines attempt to monetize. It's an illusory
14 quest and particularly here without more evidence than the
15 government has adduced in this case to monetize in that
16 fashion. There's nothing here I can rely on to figure out what
17 the amounts are. You know, the arguments that the government
18 has made here, we've been through I think most of them, are not
19 fully supportable. I'm sorry. Go ahead.

20 MS. KEARNEY: I'm sorry, Your Honor. That's exactly
21 what our argument was to Judge Talwani, that the loss here is
22 difficult to calculate. And so that's why we looked to the
23 bribe amount as an alternate measure.

24 THE COURT: Right. But I look at the bribe amount and
25 say how much? So I get to the bribe amount, and it does make a

1 difference, if it's bribery. I guess we start with the base
2 offense level of 6, and then based on the discussion of
3 specificity at least from the government about the bribe
4 amount, the government would be contending it's more than
5 40,000 but less than 95,000?

6 MS. KEARNEY: I believe the base offense level would
7 be 7.

8 THE COURT: 7, okay. I'll take that.

9 MS. KEARNEY: Then if we are basing it on a \$50,000 or
10 \$70,000 bribe, then yes, we would want to add 6. Of course the
11 government's position has been that the bribe amount was
12 \$250,000.

13 THE COURT: I understand that, but I'm not asking you
14 to say uncle, but there hasn't been sufficient evidence about
15 anything over that. And in fact, the \$20,000 in addition to
16 the 50 is questionable but it's within the range here, so we're
17 talking about a guideline range of 13, right?

18 MS. KEARNEY: Correct.

19 THE COURT: Base offense level. Okay. And the
20 guideline range for the loss that you contended before Judge
21 Talwani, under the Judge Talwani analysis, that is basic fraud?

22 MS. KEARNEY: Judge Talwani calculated the guideline.

23 THE COURT: I know what she did. But the government's
24 position with respect to that was how much? What was the
25 guideline?

1 MS. KEARNEY: It varied depending on the amount.

2 THE COURT: Okay. If the amounts were the amounts
3 here, somewhere between 40 and 95, although I understand that
4 the numbers change a little bit.

5 MS. KEARNEY: So if it were the same amounts here,
6 then that would be the same calculation, Your Honor.

7 THE COURT: 13.

8 MS. KEARNEY: Yes.

9 THE COURT: Okay. So I think maybe a way of saying
10 this is I find myself more or less in the position of Judge
11 Talwani. We've gone through this in some ways, but it seems to
12 me that, you know, she's outlined a protocol for analyzing this
13 in the context of not just uncertainty but inability to
14 identify with the kind of specificity that loss or bribe or
15 whatever should be calculated.

16 Assume that I am coming to that opinion, that is, that
17 the characterization of this seems to be a result in search of
18 a justification, that is, a result of higher guidelines or
19 higher amounts in search of a justification that can't be found
20 in the guidelines themselves. Is there anything about Judge
21 Talwani's analysis, that is the general analysis that she gave
22 in her preliminary memorandum -- I think it was September
23 5th -- 13th.

24 MS. CORRIGAN: 13th, Your Honor.

25 THE COURT: 13th, that the government disagrees with,

1 just the way in which she's dealt with that? That is, if you
2 can't specify the amounts here, then you're left to look at the
3 guideline that's provided with specificity, that's 1349 or
4 1341, the underlying one if you go to 2X. And that's to say
5 it's 0 to 6 as a guideline. Now, I'm no slave to guidelines,
6 but I just have to make the determination accurately. But
7 that's where I'd be, right? With the assumption that I've just
8 built in. I understand you don't accept the assumption, but
9 with the assumption I've built in.

10 MS. KEARNEY: With that assumption built in, I would
11 also point out, though, that Judge Talwani did find that the
12 colleges were victims, and she did appear to acknowledge that
13 there was a loss. It just was not calculable. And so she left
14 it as no loss rather than looking to the gain.

15 THE COURT: But what's the gain here?

16 MS. KEARNEY: The gain here is --

17 THE COURT: Monies received by Singer?

18 MS. KEARNEY: Is both monies received by Singer as
19 well --

20 THE COURT: But that has to be a bribe of some sort,
21 doesn't it? Let's assume that somebody pays somebody who tells
22 him they're going to give him a terrific benefit, but you can't
23 identify that as a bribe or identify it specifically as a
24 bribe. That's the same situation. It's calculable against
25 Singer but not against a defendant like the defendant here or

1 the defendants in Abbott.

2 MS. KEARNEY: Well, not where it's a conspiracy,
3 though.

4 THE COURT: Whether it's a conspiracy or not, the
5 question of what the intent was of the conspiracy, that is, to
6 extract money from unwitting or witting victims to receive
7 money for some service that has not been established to involve
8 a bribe of a specific amount amounts to the same thing under
9 this analysis.

10 MS. KEARNEY: No, Your Honor. The amounts paid by the
11 defendant to both USC's account at the Galen Center as well as
12 to Mr. Singer would be gains to the conspiracy as a whole. In
13 addition, the --

14 THE COURT: No, but the conspiracy has to be one
15 that's violative of federal law, and what you've said is or the
16 assumption that I've dealt with -- I'm not sure you said
17 this -- but essentially, it's not a bribery that can be
18 recognized under the sentencing guidelines because it's too
19 speculative, at best too speculative. So then we're left with
20 what do we say? There's money sloshing around, and we should
21 use the sloshing around money as the basis for calculating a
22 guideline.

23 MS. KEARNEY: That's one basis. In addition, the
24 other gain here is the admission spot itself --

25 THE COURT: What's the value of that?

1 MS. KEARNEY: -- which is not easily valuable --

2 THE COURT: Right. So I can't calculate that. See,
3 the point I'm getting to is these are -- they're not
4 comprehended by the guidelines. These are outside of the
5 guidelines. The guidelines, we're talking about fraud
6 guidelines which have their own problems generally, simply
7 because of the versatility of fraud. There's so many ways that
8 people can commit fraud, and every time there's a new one, it
9 doesn't really fit into the guidelines themselves. What you
10 essentially have is a kind of Procrustean bed. Procrustes was
11 a Greek mythological figure who took slaves and cut them to the
12 size of the bed that he had, not because that fit them, but
13 because it fit the structure that he was trying to deal with.
14 That's what the guidelines are on this, and on many things,
15 frankly.

16 So I do have to decide what the guidelines are. I'm
17 doing my best to do that. There's been a challenge to the
18 Probation Office. I'll put to one side whether or not that was
19 a hyperventilating challenge but a challenge. The U.S.
20 Attorney's Office says that the Probation Office disregarded
21 their views. There is no basis for saying that that happened.
22 They considered their views.

23 Now, the Probation Office has their point of view.
24 The reason I have them sitting over there is they are mere
25 witnesses in this court, which brings me to another point.

1 Maybe you can't answer it because you're not the person who can
2 answer these questions, but I noted in that submission with
3 respect to the difference of opinion with the Probation Office
4 that the U.S. Attorney's Office took the position that
5 recommendations made by the Probation Office should be public.
6 Is that the general position now, the new position of the
7 United States Attorney's Office?

8 MS. KEARNEY: Your Honor, the position of the U.S.
9 Attorney's Office is that private recommendations that neither
10 the government nor defense counsel or the defendant can respond
11 to do not further --

12 THE COURT: "Can respond to," I'm not sure I
13 understand that qualification. Is it the position of the
14 United States Attorney's Office now that the Probation Office
15 should not submit private recommendations to the judge?

16 MS. KEARNEY: Yes.

17 THE COURT: And that's consistent not just in cases in
18 which they have reason to believe that the Probation Office
19 doesn't agree with them but in every case?

20 MS. KEARNEY: Correct.

21 THE COURT: And will be taking that in every case --
22 perhaps you know for the last 20 years I've been taking that
23 position. Some of my colleagues have not. Most of them
24 haven't. But that is now the policy of the United States
25 Attorney's Office? I just want to be clear about that. And

1 that's something you can answer?

2 MS. KEARNEY: Yes, Your Honor, I can answer that, and
3 that is correct.

4 THE COURT: All right. So now we're back to this
5 issue of evaluating what Probation says, what the government
6 says and challenge to it. Put to one side the tone and also
7 the kind of defensiveness that was evidenced by the Probation
8 Office, which should understand that they're subject to
9 challenge like everybody else, and I make the decision or my
10 colleagues make the decision ultimately. That's what the
11 adversarial process is all about. But we're back down to this
12 question. We just can't figure a guideline without stretching
13 -- an amount with respect to the guideline without stretching
14 it in some fashion that is wholly speculative.

15 MS. KEARNEY: Well, going back to, we discussed
16 valuing the admission spot, and it's not wholly speculative in
17 the sense that we know what it was worth to the defendant, what
18 he was willing to pay for it.

19 THE COURT: But let's pause with that, too, because I
20 want to be sure that I understand for purposes of making an
21 evaluation that is applicable, generally applicable. Does the
22 culpability of a defendant depend upon the amount of money he
23 paid for the admission slot?

24 MS. KEARNEY: Yes.

25 THE COURT: How? So somebody drives a hard bargain

1 and they get say \$15,000 for the same service that Mr. Bizzack
2 spent \$250,000; that's a difference in culpability?

3 MS. KEARNEY: Yes, Your Honor.

4 THE COURT: How?

5 MS. KEARNEY: Because in every bribery case someone
6 sets the bribe amount. It's either the person demanding the
7 bribe or the person receiving the bribe.

8 THE COURT: But the same thing is being sold. That's
9 what we're talking about here. We're talking about a slot.
10 And so some people drive a hard bargain; some people don't.
11 But the same thing is being sold. The same value is being
12 provided. Once we start valuing in terms of slots, whether we
13 can figure out what the slot is worth in some reasonable way,
14 I'm not sure we can, but it amounts to the same thing.

15 Some victims spend more money. Some victims spend
16 less, although we can't really say in this case that we have
17 gullible victims. We have victims who know exactly what they
18 want and they pay for it, and they pay as much as they want or
19 as little as they want, but they pay it. But I don't
20 understand how culpability is shaped under these sets of
21 circumstances in the way it would be in the stealing from
22 widows and orphans, another form of fraud.

23 MS. KEARNEY: Well, here the amount represents what
24 the defendant valued that at. And so he was willing to spend
25 \$250,000 to get this guaranteed admissions spot.

1 THE COURT: But that doesn't establish the value. It
2 establishes how rich the defendant is or how good a bargainer
3 he is. It doesn't value the slot.

4 MS. KEARNEY: But that's the situation in every
5 bribery case.

6 THE COURT: Not necessarily.

7 MS. KEARNEY: In addition, here, Your Honor, the going
8 rate at USC was \$250,000. This is not the only defendant
9 who --

10 THE COURT: Were all the defendants in the USC
11 circumstances paying \$250,000?

12 MS. KEARNEY: The majority were.

13 THE COURT: So the minority were not, is another way
14 of saying that, which is to say it was not a consistent market?

15 MS. KEARNEY: There were one or two outliers.

16 THE COURT: Well, you can call them outliers, but the
17 point is there's no real market for this sort of thing.

18 MS. KEARNEY: That's correct, Your Honor, which is why
19 we have to look at the evidence that we do have.

20 THE COURT: We look at culpability. That's the point.
21 This is a rich person's crime. That's what it is. And so then
22 do we make the distinctions between how rich and how foolish
23 they are? Is that the way we do it?

24 MS. KEARNEY: No, Your Honor.

25 THE COURT: Okay. So we're back down to, you know,

1 how do we characterize this? I mean, that's what I've been
2 trying to wrestle with you about, and I appreciate your candor
3 to the degree that you're in a position to respond to the
4 questions I've raised, and I understand there are various
5 reasons why you can't answer some of the questions I raise.
6 But I have to tell you I just don't see this as a case that
7 lends itself to any meaningful analysis of gain or of loss, of
8 bribery amount calculated by means of how much money is spent,
9 even if I could, which I don't think I can in this case.

10 This is, as far as I can see, I mean, I've tried to
11 think of a way of characterizing this, but this is a kind of
12 crime of sneaky conspicuous consumption, the kind of thing that
13 rich people can do that poor people can't because they've got
14 the money to do it, to obtain a good -- let's call it a good --
15 that impresses their friends and satisfies the sense of
16 personal self-worth, but it doesn't monetize in that way or at
17 least there has not been -- maybe there will be in other cases.
18 It wasn't presented to Judge Talwani as near as I could find
19 out, and it isn't presented here.

20 So we're left with a guideline like the one that has
21 been offered here, which I adopt as the guideline in this case.
22 I, in short, reject the government's objection to the
23 guidelines. But I'll say further that on the basis of this,
24 even if we could calculate it in some fashion, it's meaningless
25 because of all the various unknowns and estimates and

1 speculations that are involved.

2 So I think I've dealt with that issue, that is to say
3 the issue of what the guideline is. I think that resolves any
4 outstanding questions here about objections, unless there's
5 some other specific objections that aren't tied directly into
6 the guideline calculation.

7 MS. KEARNEY: Not for the government.

8 THE COURT: Okay. All right.

9 MS. CORRIGAN: Not for the defense, Your Honor.

10 THE COURT: Okay. So after this long, perhaps painful
11 discussion of what the guidelines are and my view that
12 Probation has done as well as can be done in this area, and I
13 will add that, while I have an obligation to determine these
14 guidelines accurately, I don't believe that my decision on
15 sentencing is going to be, would be affected by the idea that
16 it's a bribe as opposed to a gain as opposed to a loss. It is
17 to try to capture what is the culpability of somebody who
18 engages in a cheat of the type that only rich people can do.
19 That's what I'm focusing on for myself to the degree that that
20 shapes the views of the parties in making their allocutions
21 apart from the memorandum that they've had.

22 Now let me turn to another dimension of this, because
23 as Judge Talwani said at the end of her memorandum, of course
24 it all depends on 3553. Even if the guidelines point in some
25 particular direction, it depends on 3553. And this is an area